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Vol. II

STUDI IN ONORE  
DI  
CLAUDIO ZANGHÌ

*Diritti umani*

a cura di  
L. PANELLA - E. SPATAFORA

# STUDI IN ONORE DI CLAUDIO ZANGHÌ

*Volume II*

*Diritti umani*

a cura di

LINA PANELLA - ERSILIA GRAZIA SPATAFORA



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ADOPTION AND THE EUROPEAN COURT OF HUMAN RIGHTS:  
FROM *LAISSEZ-FAIRE* TO JUDICIAL LAW-MAKING

CARMEN DRAGHICI\*

Contents: 1. The absence of a right to adopt under the European Convention on Human Rights. – 2. Eligibility to adopt, civil status and sexual orientation. – 3. Rights of the natural parents with regards to adoption proceedings. – 4. Dispensing with parental consent to further the best interests of the child. – 5. The (almost) equal standing of biological and adoptive families under Article 8. – 6. Recognition of foreign adoptions. – 7. Conclusions: the demise of the margin of appreciation doctrine?

1. *The absence of a right to adopt under the European Convention on Human Rights*

One of the most distinctive features of the jurisprudence of the Strasbourg organs is the dynamic interpretation of the provisions of the European Convention on Human Rights (ECHR), resulting in a gradual expansion of the scope of application thereof. In an attempt to reduce the discrepancy between social and legal realities, the European Court took the view that «this Convention must be interpreted in the light of present-day conditions».<sup>1</sup> This interpretative flexibility stems from the need to apply the imprecise provisions of an abstract legal text to a concrete set of facts.<sup>2</sup> It also reflects the spirit of the ECHR, which, as expressed in its Preamble, aims at ensuring not only the “safeguard” but also the “development” of human rights; by taking into account the evolution of customs and adapting the significance of the text accordingly, the ECHR monitoring bodies have attempted to guarantee the consistency of the instrument with the changing standards of society.<sup>3</sup>

Nonetheless, much as it may be sympathetic with the situation of an applicant, the European Court is not called upon to overstretch the conventional text in order to ac-

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<sup>1</sup> *Tyrer v United Kingdom*, Application no. 5856/72, European Court of Human Rights [hereinafter Eur Court H.R.] judgment of 25 April 1978, para. 31; *Marckx v Belgium*, Application no. 6833/74, judgment of 13 June 1979, para. 41.

<sup>2</sup> See M. LEVINET, *Filiation et vie familiale*, in F. SUERE (ed.), *Le droit au respect de la vie familiale au sens de la Convention européenne des droits de l'homme*, Bruxelles, 2002, p. 113: «elle est, comme tout texte juridique, 'affecté(e) d'un certain degré d'indétermination' et nécessite la construction de la signification de l'énoncé propre à tout 'agir juridictionnel', autrement dit 'une interprétation avant tout acte d'application'».

<sup>3</sup> See L. PETTITI – E. DECAUX – P. H. IMBERT (eds.), *La Convention Européenne des Droits de l'Homme. Commentaire article par article*, Paris, 1995, p. 308.

commodate any social or legal novelty intervened after the adoption of the Convention. In fact, it is not the Court's prerogative to establish new rights by way of judicial amendment of the Convention. Any new rights that the Contracting Parties come to consider worthy of international guarantee should form the object of inter-governmental negotiation aimed at introducing further additional protocols.

The evolutive approach to the interpretation of ECHR, seen as a "living instrument", can be particularly discerned with regards to the notion of "family life", the Court having continuously redefined sexuality, social parenthood and family-like cohabitation.<sup>4</sup> Nonetheless, faced with repeated applications revolving around the right to adopt, and despite the widespread enactment of adoption legislation in Europe, the Strasbourg judge refused to overstep its interpretative role, indicating that it is not willing to read a new right into the Convention.

In an early decision in the case of *X v Belgium and Netherlands*, the European Commission stressed that there is no express provision guaranteeing a right to adopt either in the European Convention itself or in the International Covenant on Civil and Political Rights.<sup>5</sup> Consequently, there is no obligation for the State under Article 12 to recognize to a foster carer a particular status in relation to the child they had in their care. Since the case involved a sole applicant, and any rights under Article 12 concern heterosexual couples,<sup>6</sup> the Commission did not discuss the more general issue of whether there is a positive obligation for States to guarantee the alternative of adoption to married couples unable to procreate and found a family.

The issue was subsequently addressed in the *X and Y v United Kingdom* decision, where the Commission rejected the contention that the State's positive obligations under Article 12 encompassed an obligation to guarantee the right to adopt.<sup>7</sup> According to the Commission, the right to found a family within the meaning of Article 12 protects a couple's right to naturally procreate, but does not guarantee the right to integrate into the family, through adoption or otherwise, a child who is not the biological child of the couple.<sup>8</sup> Furthermore, since the institution of adoption does not respond to an ECHR right, «it is left to national law to determine whether, or subject to what conditions, the exercise of the right in such a way should be permitted».<sup>9</sup>

Consequently, both the right to adopt and the conditions for its exercise appeared to fall outside the scope of the ECHR and the supervision of the Strasbourg organs. Ini-

<sup>4</sup> See M. LEVINET, *Filiation et vie familiale*, cit.

<sup>5</sup> See *X v Belgium and Netherlands*, Application no. 6482/74, European Commission on Human Rights [hereinafter Eur Comm H.R.] decision of 10 July 1975, at 77: «The Commission recalls that the right to adopt is not, as such, included among the rights guaranteed by the Convention. Nor does it appear in the International Covenant on Civil and Political Rights (in particular Articles 23 and 24)».

<sup>6</sup> See below, para. 2.

<sup>7</sup> *X and Y v United Kingdom*, Application no. 7229/75, Eur Comm H.R. decision of 15 December 1977.

<sup>8</sup> See *ibid.*, p. 34: «[W]hilst it is implicit in Article 12 that it guarantees a right to procreate children, it does not as such guarantee a right to adopt or otherwise integrate into a family a child which is not the natural child of the couple concerned».

<sup>9</sup> *Ibid.*

tially, where national legislations contemplated adoption, the control of legitimacy by the European organs remained external, insofar as any measure based on a legislative provision was found consistent with the Convention. In *X v Netherlands*, a couple of Dutch citizens of Polish origins had applied for authorization to adopt a Polish child, and their request had been refused on the ground that two criteria prescribed by national law were not met: the difference of age between adopters and adoptee should not exceed 40 years, and the child should not have reached school age. The Commission found the decision of the Dutch authorities compatible with Article 12, «since the relevant national provisions did not allow the exercise of the right in the way envisaged by the applicant and her husband».<sup>10</sup> The Commission highlighted that according to Article 12 of the Convention, a family can be founded – including by adoption – in accordance with the provisions of national law governing the exercise of this right.

Attempts to ground a right to adopt in Article 8 have proved equally unsuccessful. The issue was discussed in the *Fretté v France* judgment of 2002, concerning the refusal of national authorities to allow an unmarried homosexual person to adopt. The Strasbourg Court stressed that the right to adopt was not guaranteed by Article 8, insofar as «the right to respect for family life presupposes the existence of a family and does not safeguard the mere desire to found a family».<sup>11</sup>

While the jurisprudence has persistently asserted the lack of a right to adopt under the ECHR, adoption has not remained outside the scope of the scrutiny of Strasbourg organs. Quite on the contrary, as argued below, they have increasingly used the parameters of legitimacy developed in relation to the second paragraph of Articles 8 to 11 and the requirements of Article 14 to supervise States' adoption policies. The Court's jurisprudence has affected the autonomy of States in regulating this institution, from the eligibility criteria for prospective adopters to the recognition of foreign adoptions. Less surprisingly, the case law has also emphasized the rights of natural parents in adoption proceedings and the limits thereof, and has found that, where national law permitted the creation of legal ties between adopter and adoptee, their family life is entitled to the same protection as the family life of biological parents and children. The following paragraphs seek to examine the relevant case law, and attempt an appraisal from the viewpoint of its consistency with the long-established techniques of interpretation of the ECHR.

## 2. Eligibility to adopt, civil status and sexual orientation

The UN General Assembly Resolution 41/85 of 3 December 1986 proclaiming the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally reveals a world-wide consensus on the social function of adoption. Article 13 of the Declaration clearly indicates that adoption does not serve the purpose of ena-

<sup>10</sup> *X v Netherlands*, Application no. 8895/80, Eur Comm H.R. decision of 10 March 1981, p. 178.

<sup>11</sup> *Fretté v France*, Application no. 365.5/97, Eur Court H.R. judgment of 26 February 2002, para. 32.

bling infertile couples to have children; rather, «[t]he primary aim of adoption is to provide the child who cannot be cared for by his or her own parents with a permanent family». Consequently, as expressed in Article 5, «[i]n all matters relating to the placement of a child outside the care of the child's own parents, the best interests of the child, particularly his or her need for affection and right to security and continuing care, should be the paramount consideration». These concerns can justify domestic policies limiting the eligibility to adopt to certain categories of applicants considered capable of offering a stable home, and the conditions for the harmonious development of the child (e.g. married couples). Regardless of the specific national provisions on eligibility, the generation of parental status through adoption presupposes, in all domestic legal systems, a stamp of approval from the competent authorities.<sup>12</sup>

Under the ECHR, absent a right to adopt, States should arguably enjoy a wide margin of appreciation in defining their legislative policies on adoption, in particular by restricting the eligibility of adopters and adoptees according to their own assessment of what better serves the interests of the child in the given social context. This was also the initial stance of the Strasbourg organs, though the restrictions in respect of single persons, unmarried couples and homosexuals have proved to be increasingly contentious.

In the above-mentioned case of *X v Belgium and Netherlands*, the Commission clarified that Article 12 does not protect the right to have children outside marriage, insofar as this provision guarantees one single right, «to marry and to found a family», rather than two separate rights.<sup>13</sup> The Commission seems to admit that a man and a woman of marriageable age, albeit not married, may have a right to found a family, whereas in the absence of a couple there is no similar individual right: «However, even assuming that the right to found a family may be considered irrespective of marriage, the problem is not solved. Article 12 recognises in fact the right of man and woman at the age of consent to found a family i.e. to have children. The existence of a couple is fundamental».<sup>14</sup> The Commission apparently avoids taking a stand on the matter: the ambiguous wording «even assuming» may indicate a mere hypothetical concession reinforcing the argumentation. What is clear is that the guarantee in Article 12 only benefits the couple, more specifically the heterosexual couple, therefore the eligibility of the single person to adopt cannot find support in this provision.

The applicant in *X v Belgium and Netherlands*, a Dutch national living in Belgium, was denied the possibility to adopt an abandoned child for whom he had cared for sev-

<sup>12</sup> See P. MOROZZO DELLA ROCCA, *Riflessioni sul rapporto tra adozione e procreazione medicalmente assistita*, in *Dir. Fam. Pers.*, 2005, p. 218: «quando la filiazione deriva tout court dalla procreazione naturale, il diritto, tradizionalmente, non pone limiti [...], mentre una disciplina abilitante e nel contempo limitante accompagna sempre la domanda sociale di filiazione».

<sup>13</sup> See *X v Belgium and Netherlands*, cit., p. 77: «[Article 12] does not guarantee the right to have children born out of wedlock. Article 12, in fact, foresees the right to marry and to found a family as one simple right».

<sup>14</sup> *Ibid.*

eral years, merely on the ground that he was unmarried.<sup>15</sup> The Commission hastily dismissed the application of Article 8 relying on the absence of a right to adopt, as discussed above. It failed to distinguish between an application for a generic authorization to adopt and an adoption application in respect of a minor already cared for by the applicant. Surprisingly, the Commission did not attempt to establish whether the lengthy family-like relationship between the foster parent and the child amounted to «family life» within the meaning of Article 8. Nor did it make any inquiry into the child's welfare, for example by discussing whether a court order formalizing the relationship could have better provided the child with a secure home environment, patrimonial rights or psychological comfort.

A further challenge to the denial of a right to adopt for single persons (this time regarding the general authorization to adopt) was considered in the *Di Lazzaro v Italy* 1996 decision. The Commission declared the application inadmissible by reiterating and synthesizing the motivations put forward in the earlier case law: «The Commission recalls that the right to adopt is not, as such, included among the rights guaranteed by the Convention and that Article 8 does not oblige States to grant to a person the status of adoptive parent or adopted child. Article 12 of the Convention, which recognises the right of man and woman at the age of consent to found a family, implies the existence of a couple and cannot be construed as including the right of an unmarried person to adopt».<sup>16</sup>

Applications by single persons may have some prospects of success where brought against a State party to Protocol 12, which extends the principle of non-discrimination in Article 14 to the enjoyment of any right guaranteed by the domestic legal order, regardless of its presence in the ECHR.<sup>17</sup> The Strasbourg Court is likely to analyse the restriction of the right to adopt in the case of unmarried persons as different treatment motivated by the civil status. The burden of proof would then lie on the State to show why the difference was justified, and that the measure was proportionate to the aim pursued.

The cause of homosexual aspiring adopters has recently obtained the assent of the Strasbourg Court, though it came after a long and strenuous battle for the recognition of homosexuals' rights under the ECHR. Initially, the rights of homosexuals under the Convention were only upheld in relation to their private life, with the Strasbourg organs prompting for the decriminalization of sexual activity privately engaged in by

<sup>15</sup> The Belgian civil code authorized adoption by foreign residents, provided that they satisfied the conditions imposed by their national law: according to the Dutch civil code, the unmarried person could not adopt.

<sup>16</sup> *Di Lazzaro v Italy*, Application no. 31924/96, Eur Comm H.R. decision of 10 July 1997, p. 139.

<sup>17</sup> Article 1 of Protocol 12 reads: «The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a racial minority, property, birth or other status» (emphasis added). The Protocol was adopted on 4 November 2000 and entered into force on 1 April 2005. To date it has been ratified by only 18 of the 47 Member States of the Council of Europe [last updated 13 February 2010].



consenting adults. The legitimacy of legislation criminalizing homosexual activity, at one time considered to fall within the wide margin of appreciation of the Contracting Parties, was challenged in the famous 1981 *Dudgeon* case,<sup>18</sup> and more recently confirmed in *A.D.T. and Sutherland v UK* in 2001.<sup>19</sup> In subsequent cases the Court took a step further by condemning not only the criminal repression of homosexuality but also any form of discrimination based on sexual orientation, for example in the field of employment in the armed forces, as illustrated by the 1999 judgments in *Smith and Grady v United Kingdom* and *Lustig-Prean and Beckett v United Kingdom*.<sup>20</sup>

However the case law on the legal significance of same-sex cohabitation under the Convention has been slow to recognize any family dimension to homosexual partnerships. Starting with the 1983 decision in *X and Y v United Kingdom*, the Strasbourg organs have consistently failed to classify stable homosexual cohabitation as "family life" for the purposes of Article 8, analysing it under the "private life" pillar of the provision, in contrast with the approach taken with respect to heterosexual cohabitation: «Despite the modern evolution of attitudes towards homosexuality, the Commission finds that the applicants' relationship does not fall within the scope of the right to respect for family life ensured by Article 8. On the other hand [...] certain restraints on homosexual relationships could create an interference with an individual's right to respect for his private life ensured by Article 8. The Commission finds that the applicants' relationship is a matter of their private life».<sup>21</sup> More recently, Commission reiterated this view in the 1996 *Röösli v Germany* decision, where it also found that reserving special protection to families (encompassing married couples and heterosexual cohabitants) constituted objectively and reasonably justified different treatment.<sup>22</sup>

<sup>18</sup> *Dudgeon v United Kingdom*, Application no. 7525/76, Eur Court H.R. judgment of 22 October 1981, paras. 40-41, subsequently confirmed in *Norris v Ireland*, Application no. 10581/83, Eur Court H.R. judgment of 26 October 1988, paras. 35-38, and *Modinos v Cyprus*, Application no. 15070/89, Eur Court H.R. judgment of 22 April 1993, para. 24. All previous applications had been rejected on the ground that, in a democratic society, the right to private life could be lawfully interfered with by the public authorities in order to guarantee the protection of health or morals.

<sup>19</sup> *A.D.T. v United Kingdom*, Application no. 35765/97, judgment of 31 July 2000, para. 23 (criminalization of private homosexual activity involving more than two men); *Sutherland v United Kingdom*, Application no. 25186/94, Eur Comm H.R. report of 1 July 1997, paras. 64-66 (different age of consent for homosexual and heterosexual acts).

<sup>20</sup> *Smith and Grady v United Kingdom*, Applications nos. 33985/96 and 33986/96, Eur Court H.R. judgment of 27 September 1999, paras. 93-105; *Lustig-Prean and Beckett v United Kingdom*, Applications nos. 31417/96 and 32377/96, Eur Court H.R. judgment of 27 September 1999, paras. 95-98.

<sup>21</sup> *X and Y v United Kingdom*, Application no. 9369/81, Eur Comm H.R. decision of 3 May 1983, at 221. See also, with regard to a lesbian relationship, *S v United Kingdom*, Application no. 11716/85, Eur Comm H.R. report of 14 May 1986, para. 2: «the Commission recalls that it has already found that, despite the modern evolution of attitudes towards homosexuality, a stable homosexual relationship between two men does not fall within the scope of the right to respect for family life ensured by Article 8 [...] The present applicant's relationship with her now deceased partner accordingly also falls outside the scope of Article 8 (Art. 8) insofar as it protects the right to respect for family life».

<sup>22</sup> See *Röösli v Germany*, Application no. 28318/95, Eur Comm H.R. decision of 15 May 1996: «[a]s regards family life, [...] despite the modern evolution of attitudes towards homosexuality, a stable homosexual relationship between two men does not fall within the scope of the right to respect for family

The choice of treating same-sex partnerships as a manifestation of private, but not family life, was criticized by the legal scholarship as inconsistent with the jurisprudence in other areas.<sup>23</sup> It was argued that marriage does not constitute a pre-condition of family life, according to the very jurisprudence of the Strasbourg organs.<sup>24</sup> This position also appears at odds with the principle identifying family life wherever there are effective ties between those concerned.<sup>25</sup> Moreover, the Court has acknowledged that family life exists even where one member is a transgender person whose newly acquired sex is not legally recognized (which legally amounts to a same-sex relationship), precisely in the light of the effective bonds and family-like caring, support, and sharing of daily-life responsibilities.<sup>26</sup>

However, the case law on homosexual cohabitation evidenced how the lack of recognition of same-sex cohabitants as families adversely affects their patrimonial interests.<sup>27</sup> If in *Röösli v Germany* the Commission held that the surviving same-sex partner cannot base a right to succeed to the lease on Article 8, subsequent judgments took a more favourable view, allowing stable same-sex cohabitants to better cope with practical difficulties. In the 2003 *Karner v Austria* judgment, the European Court accepted that the impossibility for the applicant to take over the lease of the deceased same-sex cohabitant affected the right to protection of the home under Article 8; however, it still did not qualify homosexual cohabitation as family life.<sup>28</sup> The Court recalled that the different treatment of homosexual couples may be justified by the legitimate objective of preserving the traditional family unit, but also stressed that differences based exclusively on sexual orientation require a particularly strong justification.<sup>29</sup> It indicated that, in a field like discrimination where the margin of appreciation of national authorities is narrow, the respect of proportionality between the aim pursued and the means employed required a demonstration that it was necessary, in order

life ensured by Article 8 [...] The question remains, however, of whether it was justified to protect families but not to give similar protection to stable homosexual or lesbian relationships. The Commission recalls that the family, to which the relationship of heterosexual unmarried couples living together as husband and wife can be assimilated, merits special protection in society and that there is no reason why a High Contracting Party should not afford particular assistance to families. The Commission therefore accepted that the difference in treatment between the surviving partner of a homosexual or lesbian couple and somebody in the same position whose partner had been of the opposite sex can be objectively and reasonably justified».

<sup>23</sup> See F. SUDRE, *Droit international et européen des droits de l'homme*, Paris, 2001<sup>5</sup>, p. 282.

<sup>24</sup> See G. VAN BUEREN, *The International Protection of Family Members' Rights as the 21<sup>st</sup> Century Approaches*, in *Hum. Rights Quart.*, 1995, pp. 737-738.

<sup>25</sup> See e.g. *Kroon and Others v Netherlands*, Application no. 18535/91, Eur Court H.R. judgment of 27 October 1994, paras. 29-30.

<sup>26</sup> *X, Y and Z v United Kingdom*, Application no. 21830/93, Eur Court H.R. judgment of 22 April 1997, para. 37.

<sup>27</sup> See F. SUDRE, *Droit international*, cit.

<sup>28</sup> See *Karner v Austria*, Application no. 40016/98, Eur Court H.R. judgment of 24 July 2003, para. 33: «The Court does not find it necessary to determine the notions of "private life" or "family life" because, in any event, the applicant's complaint relates to the manner in which the alleged difference in treatment adversely affected the enjoyment of his right to respect for his home guaranteed under Article 8».

<sup>29</sup> *Ibid.*, para. 37 and 40.

to reach the aim, to exclude homosexual couples from the application of the relevant legislation.<sup>30</sup> Finding that the measure had not been proved necessary, the Court concluded that the measure breached Article 8 taken in conjunction with Article 14.<sup>31</sup>

In *Salgueiro Da Silva Mouta v Portugal*, the Strasbourg Court has for the first time approached sexual orientation from the viewpoint of family life, though not in respect of a same-sex partnership, but as regards discrimination against the homosexual parent in custody proceedings.<sup>32</sup> The Court found a violation of Article 14 taken in conjunction with Article 8 in the decision of the Lisbon Appeal Court to reverse a residence order in favour of the father merely on the ground that he was in a same-sex relationship with another man.<sup>33</sup> Recalling its earlier jurisprudence regarding child custody, in which a parent had been discriminated against on account of her religious convictions,<sup>34</sup> the Court found that the Portuguese court's decision amounted to discrimination based on sexual orientation. The judgment was in line with Recommendation 924 (1981) of the Parliamentary Assembly of the Council of Europe on discrimination against homosexuals, which specifically addresses custody of children and visitation rights.<sup>35</sup> However, the judgment did not contribute to advancing the family rights of same-sex cohabitants, as no new right was upheld. Since the mutual enjoyment of parent and child constitutes an essential element of family life,<sup>36</sup> the bond between them is indissoluble, and State authorities are obliged to allow them to lead a normal family life,<sup>37</sup> even when one parent has subsequently manifested his or her homosexual orientation.<sup>38</sup>

That said, the presence of children does not automatically place a same-sex rela-

<sup>30</sup> *Ibid.*, para. 41.

<sup>31</sup> *Ibid.*, para. 42-43.

<sup>32</sup> *Salgueiro da Silva Mouta v Portugal*, Application no. 33290/96, Eur Court H.R. judgment of 21 December 1999. The applicant had been repeatedly denied access to his daughter by his ex wife, in breach of his custody rights as agreed upon divorce. He had consequently sought, and obtained in first instance, custody of the child, but the decision had been reversed on appeal based on the child's welfare and on the sexual orientation of the father, who lived with another man. The appeal court's decision stigmatized the father's sexual orientation and focused on it to a considerable extent.

<sup>33</sup> *Ibid.*, paras. 34-35.

<sup>34</sup> In *Hoffmann v Austria*, the Court had established that the mother's affiliation with Jehovah's witnesses could not be used against her in proceedings aimed at determining the son's custody, as a distinction merely based on religious beliefs was not acceptable. See *Hoffmann v Austria*, Application no. 12875/87, Eur Court H.R. judgment of 23 June 1993, para. 58.

<sup>35</sup> See Recommendation 924 (1981) of the Parliamentary Assembly of the Council of Europe on discrimination against homosexuals, point 7: «Recommends that the Committee of Ministers: [...] iii. call on the governments of the member states: [...] d. to ensure that custody, visiting rights and accommodation of children by their parents should not be restricted on the sole grounds of the homosexual tendencies of one of them».

<sup>36</sup> *Eriksson v Sweden*, Application no. 11373/85, Eur Court H.R. judgment of 22 June 1989, para. 58.

<sup>37</sup> *Marckx v Belgium*, cit., para. 31.

<sup>38</sup> See M. LEVINET, *Filiation et vie familiale*, cit., p. 142: «[L]orsqu'une relation hétérosexuelle – mariage ou union libre – a existé avant la conversion sexuelle ou avant l'instauration du «couple» homosexuel et que des enfants en sont issus, il n'y a aucun problème pour reconnaître l'existence de liens familiaux et la nécessité de les sauvegarder».

tionship within the scope of "family life" as protected by Article 8, even when they are raised as children of the couple. In *C and LM v United Kingdom*, the sharing of parenting tasks by a couple of same-sex cohabitants in respect of the infant daughter born through artificial insemination with donor and the financial dependence of the biological mother and the child on the other woman were not considered to engage Article 8 with reference to the right to respect for family life.<sup>39</sup> Similarly, in *Kerkhoven and Hinke v Netherlands*, the lesbian partner of the mother of a child born through donor insemination, who contributed to raising the child as a second female parent, applied for joint parental authority over the child and was refused. The Commission held that their relationship fell outside the scope of Article 8 insofar as it protects the right to respect for family life.<sup>40</sup>

In the absence of pre-existing family life coming under the scope of Article 8, there is no right for the homosexual aspiring parent under Article 12 to create a family, by either adopting an abandoned minor or the child of the partner. In the above-mentioned case of *Fretté v France*, the applicant, relying on Article 14 taken in conjunction with Article 12, claimed that he had a right of access to adoption with a view to founding a family, arguing that such a right was guaranteed to everyone without any distinction as to sexual orientation. Recalling the Commission's decision in *Di Lazzaro v Italy*, the Court declared this part of the complaint inadmissible, insofar as Article 12 only guarantees the right to marry and found a family to heterosexual couples and does not encompass a right to adopt.<sup>41</sup>

An examination on the merits was, however, considered necessary insofar as Mr Fretté's claim based on Article 8 was concerned. Interestingly, after establishing that the right relied on by the applicant was not guaranteed by Article 8 either,<sup>42</sup> the Court nonetheless proceeded to analyse whether there had been a violation of Article 8 taken in conjunction with Article 14: «However, French domestic law [...] authorises all sin-

<sup>39</sup> *C and LM v United Kingdom*, Application No. 14753/89, Eur Comm H.R. decision of 9 October 1989. The Commission found that «lesbian partnership involves private life», and accepted that the deportation of the biological mother, an Australian national, and the baby «will have repercussions» on their private life, but maintained that «lawful deportation [...] cannot, in principle, be regarded as an interference with this Convention provision, given the State's right to impose immigration controls and limits».

<sup>40</sup> *Kerkhoven and Hinke v Netherlands*, Application No. 15666/89, Eur Comm H.R. decision of 19 May 1992. The Commission further considered that: «the statutory impossibility for the first applicant to be vested with the parental authority over the third applicant does not entail any restriction in the applicants' enjoyment of their private life», therefore «there has been no interference with the applicants' right to respect for their private life».

<sup>41</sup> See *Fretté v France*, Application no. 36515/97, Eur Court H.R. decision of 12 June 2001, para. 1: «La Cour rappelle que l'article 12 de la Convention se borne à garantir le droit de se marier à l'âge nubile à deux personnes de sexes biologiques différents et ni cet article ni l'article 14 ne garantissent le droit à l'adoption».

<sup>42</sup> *Fretté v France*, Application no. 36515/97, Eur Court H.R. judgment of 26 February 2002, para. 32. The Court also considers that the dismissal of the authorization to adopt did not infringe the right to respect for private life: «the decision to dismiss the applicant's application for authorisation could not be considered to infringe his right to the free expression and development of his personality or the manner in which he led his life, in particular his sexual life».

gle persons – whether men or women – to apply for adoption [...] and the applicant maintained that the French authorities' decision to reject his application had implicitly been based on his sexual orientation alone. If this is true, the inescapable conclusion is that there was a difference in treatment based on the applicant's sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention». <sup>43</sup>

The analysis was rather confined to Article 14 taken independently, <sup>44</sup> even though this provision has no autonomous application where the matter complained of falls outside the scope of any of the ECHR substantive rights. <sup>45</sup> The Court considered that the decision of the French authorities that the applicant was unsuitable to adopt had followed an examination by the competent body and pursued the legitimate aim of safeguarding the health and rights of the minor potentially adopted. <sup>46</sup> The reports drafted by the social workers, in which Mr Fretté's aptitude to raise a child was assessed, mentioned the lack of a maternal referent in his family. The European Court supported the thesis of the respondent government, according to which what was at stake was not only the interest of the adult to adopt, but also the interests of the child potentially integrated into a new family environment. Faced with competing interests, the Court insisted on the primacy of the rights of the child, emphasizing that «[a]doption means "providing a child with a family, not a family with a child"». <sup>47</sup>

Once established that the measure pursued a legitimate aim, the Court examined whether the balance implicitly requested by Article 14 between the aim and the means employed had been observed. In that connection the Court noted the lack of consensus among the Contracting Parties as to the suitability of homosexuals to adopt, and thus concluded that a wide margin of appreciation needs to be recognized in favour of do-

<sup>43</sup> *Ibid.*

<sup>44</sup> In practice, the case is treated as an application under Protocol 12 ECHR, establishing a general prohibition of discrimination, with independence from the violation of a right enshrined in the Convention. France had not ratified Protocol 12, therefore, it could not be relied on. However, in relation to the States Parties to the Protocol, where national legislation recognizes the right to adopt to unmarried persons, the refusal based on sexual orientation can be analysed as different treatment in respect of a right set forth by domestic legislation (though not an ECHR right). It could be maintained that, once the national legislation establishes a right to adopt, any difference in treatment based on sexual orientation must have a legitimate justification. However, the "morals" or "rights of others" (i.e. of adoptable children) are volatile concepts, and the difference of treatment may not necessarily be categorized as discrimination given the wide scientific and sociological controversies on the matter.

<sup>45</sup> See P. MURAT, *Filiation et vie familiale*, in SUDRE, *Le droit au respect de la vie familiale*, cit., p. 196: «au lieu de développer une argumentation au sujet du lien entre vie privée et procédure d'agrément auquel on s'attendrait, la Cour tourne vers la démonstration de l'existence d'une différence de traitement qui nous ramène à l'article 14 invoqué de manière indépendante».

<sup>46</sup> See *Fretté v France*, judgment cit., para. 38: «In the Court's opinion there is no doubt that the decisions to reject the applicant's application for authorisation pursued a legitimate aim, namely to protect the health and rights of children who could be involved in an adoption procedure, for which the granting of authorisation was, in principle, a prerequisite».

<sup>47</sup> *Ibid.*, para. 41.

mestic authorities. <sup>48</sup> This circumspection is perhaps surprising after the Court went the extra mile to demonstrate that Article 8 was applicable. <sup>49</sup> Even though it acknowledged that the ECHR is a living instrument, it affirmed that the State is better placed to decide under which circumstances adoption can offer the minor a stable and harmonious development. <sup>50</sup> The Court thus refused to take a stand on the issue of homosexuals' suitability to adopt. Though commentators might see it as a convenient manoeuvre, <sup>51</sup> the choice was probably appropriate, considering the lack of decisive scientific evidence in either direction, and the lack of a homogeneous legislative approach throughout the Council of Europe States.

The question has, however, returned to the attention of the Strasbourg court with the *E.B. v France* case, <sup>52</sup> and the 2008 ruling effectively superseded *Fretté v France*. In a markedly split decision, the Grand Chamber held by ten votes to seven that there had been a violation of Article 14 in conjunction with Article 8 in respect of the authorities' refusal to allow the lesbian applicant to adopt a child. As far as the admissibility of the case was concerned, the Court found that the facts of the case (in particular the French legislation expressly granting single persons the right to apply for authorization to adopt) fell within the ambit of Article 8: in creating a right to adopt, the French State had gone beyond its obligations in Article 8, but once the right was created national authorities were not permitted to take discriminatory measures in applying it. <sup>53</sup>

The issue before the court was, therefore, whether the decisive consideration given to the homosexuality of E.B. in assessing her adoption application amounted to discrimination. In this respect, the Court found that the rejection was motivated by two main grounds: the lack of commitment of E.B.'s same-sex cohabitant, and the absence of a father figure in the household. The Court noted that there had been no discrimination with regard to the first ground for rejection (the partner's attitude towards adop-

<sup>48</sup> See *ibid.*: «Since the delicate issues raised in the case, therefore, touch on areas where there is little common ground amongst the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, a wide margin of appreciation must be left to the authorities of each State».

<sup>49</sup> See P. MURAT, *Filiation*, cit., p. 200: «Fidèle à la technique utilisée pour les problèmes complexes et polémiques, la CEDH se réfugie derrière l'absence de dénominateur commun aux systèmes juridiques des Etats contractants [...] pour conclure qu'il est souhaitable de laisser une large marge d'appréciation aux autorités de chaque Etat. La solution est sans doute sage, même si certains ne manqueront pas de trouver paradoxal qu'après avoir retenu de manière quelque peu hardie l'applicabilité de la Convention, la Cour paraisse faire preuve de frilosité et donne l'impression de s'arrêter au milieu du gué [...]».

<sup>50</sup> See *Fretté v France*, judgment cit., para. 42: «If account is taken of the broad margin of appreciation to be left to States in this area and the need to protect children's best interests to achieve the desired balance, the refusal to authorise adoption did not infringe the principle of proportionality». Having regard to the competing interests of the applicant and potential adoptees, and to the paramountcy of the child's best interests, the Court noted that the scientific community was divided over the possible consequences of a child being adopted by one or more homosexual parents.

<sup>51</sup> See S. CABALLERO SANZ, *La familia en perspectiva internacional y europea*, Valencia, 2006, p. 103: «una vez más, el tribunal elude el espinoso tema de la relación entre familia y homosexualidad».

<sup>52</sup> *E.B. v France*, Application no. 43546/02, Eur Court H.R. judgment of 22 January 2008.

<sup>53</sup> *Ibid.*, paras. 48-49.



tion); where an unmarried applicant had set up home with a partner (same-sex or not), the best interests of the child joining the home required consideration of the partner's attitude, in the light of the role that the latter would necessarily play in the life of the child on a daily basis.<sup>54</sup>

As to the objection relating to the absence of a father figure, the Court did not find it problematic in itself, but the excessive references in a case concerning adoption by a single person was considered to be implicitly connected with the applicant's homosexuality.<sup>55</sup> Consequently, the applicant had suffered a difference in treatment which the Court found discriminatory insofar as based on sexual orientation. The Court also noted that the two main grounds for rejection formed part of an overall assessment of the applicant's suitability to adopt, therefore the illegitimacy of one of the grounds had the effect of contaminating the entire decision.<sup>56</sup>

If in *Fretté* the Court was to some extent excessively prudent, in *E.B.* it arguably was over simplistic. The majority of the Court considered that, since national law allowed unmarried persons to adopt, the absence of a paternal referent in the household of a lesbian adopter was not a sufficient reason to deny adoption. The Court seems to miss the actual core of the debate surrounding adoption by homosexuals, which lies in distinguishing between the absence of either the maternal or the paternal figure (which is not out of the ordinary, given the frequency of single-parent families), and the presence of two maternal/ paternal figures. A genuine analysis of the problem should have aimed at determining whether, for the child, being integrated into a same-sex family raised welfare issues or not, in the light of the psychological and social impact of such adoption. Since the case was one about competing interests, insufficient attention was arguably paid to the traditional balancing exercise. The Court simply assumed that a difference of treatment based on sexual orientation, if proved, would amount to discrimination, implicitly dismissing the possibility for an objective justification based on the health or the rights of the child: "In the Court's opinion, if the reasons advanced for such a difference in treatment were based solely on considerations regarding the applicant's sexual orientation this would amount to discrimination under the Convention".<sup>57</sup> However, this demonstration had not yet been made in *E.B.*, and previously in *Fretté* the inquiry had ended in a *non liquet*! Ultimately the priority given to the prohibition of discrimination seems to oust the fair balance principle, the paramountcy of the child's welfare, and the principle that not every difference in treatment amounts to discrimination.

Moreover, the suggestion that the wrongful reliance on the lack of a paternal referent invalidated the entire assessment process underestimates the relevance of the lack of commitment of the lesbian partner – the other argument disqualifying *E.B.*'s adop-

<sup>54</sup> *Ibid.*, paras. 75-77.

<sup>55</sup> *Ibid.*, para. 87.

<sup>56</sup> *Ibid.*, para. 80.

<sup>57</sup> *Ibid.*, para. 93.

tion application. To be sure, the reluctance of the applicant's stable cohabitant to raise the child could have constituted in itself a sufficient reason not to grant the authorization sought: it could hardly be beneficial for a child to be brought up in a family where one member is not interested in rearing a child. In fact, in some jurisdictions sole applications by married persons are not accepted precisely on this ground.<sup>58</sup>

Looking beyond the particular facts of the case, the *E.B.* judgment effectively does away with the margin of appreciation as to the eligibility to adopt. The reliance on non discrimination as an almost self-standing right, whenever the matter is remotely connected with an ECHR right, has the same practical effect as invoking Protocol 12. This means that the discretion left to national legislatures in establishing the eligibility of adopters is very limited, insofar as any difference in treatment needs to be justified by compelling reasons in order to escape the label of discrimination. In the light of *E.B.*, it can be maintained that wherever States allow single persons to adopt, they cannot restrict it based on sexual orientation in the (mistaken or not) belief that the limitation better serves the interests of adoptable children. Analogously, adoption by same-sex couples seems to be now covered by the non-discrimination principle, as legislation allowing only heterosexual couples to adopt would necessarily establish a distinction based on sexual orientation.

The judgment eventually opens more questions than it answers. It is not unreasonable to assume that a future claim of a sole adoption applicant in a country exclusively allowing adoption by couples will be analysed as discrimination on the grounds of marital status. If *E.B.* is to be applied consistently, a new *Di Lazzaro v Italy* application should be found admissible, since the matter does involve family issues under Article 8, and there is a difference in treatment based on a characteristic peculiar to a group. Similarly, it is not too far-fetched to expect that a specific difference of age between adopter and adoptee prescribed by the domestic legislation, or indeed the minimum age required in order to adopt,<sup>59</sup> will be analysed as discrimination on the grounds of age. Thus, member States are able to retain an extremely narrow margin of appreciation in regulating adoption domestically, whereas the forefront of law-making in this area has seemingly moved to Strasbourg.

### 3. Rights of the natural parents with regards to adoption proceedings

The institution of adoption does not pursue the goal of social engineering, and children are not placed with adoptive families only because they would be better off. There

<sup>58</sup> In England and Wales, sole applications by married persons are not acceptable unless the spouse is missing, separated from the applicant or incapable of making an application for an adoption order by reason of physical or mental ill-health. See s. 51 (1) and (3) Adoption and Children Act 2002. Arguably, the same regime should apply to stable cohabitants.

<sup>59</sup> The minimum age required to qualify as a potential adopter is not necessarily the majority. For example, in England and Wales, the adopter needs to have attained the age of 21 years (s 50 (1) Adoption and Children Act 2002), whereas the age of majority is already attained at the age of 18 (s 1 (1) Family Law Reform Act 1969).

is international consensus that adoption should only be seen as a solution where the birth family is unable or unwilling to care for the child. Absent such extraordinary circumstances, the natural bond between parents and children is widely recognized and protected, as evidenced by the already recalled UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally. Article 3 of the Declaration acknowledges that the child's welfare is best promoted if the child is raised by his or her birth family.<sup>60</sup> According to Article 4 of the Declaration, adoption should be considered where the development of the child within the birth family is impracticable (because the parents are deceased, unknown, or unwilling to care for them) or exposed to harm (where the parents neglect or subject the child to ill-treatment).<sup>61</sup>

The case law of the Strasbourg organs reflects the general international outlook on adoption as a means of last resort, where the biological parents are unable or unwilling to assume parental responsibility. Thus, in *Johansen v Norway* the Court stressed that the taking into care of the applicant's daughter on a permanent basis with a view to adoption and the deprivation of her parental rights and access to the child constituted an interference with the child's and the mother's right to mutual enjoyment under Article 8.<sup>62</sup> The Court was satisfied that the impugned measures were in accordance with domestic law and pursued legitimate aims, as they aimed at protecting the "health" and "rights and freedoms" of the applicant's daughter.<sup>63</sup> However, in respect of the deprivation of the applicant's parental rights and access, the Court found that «it had a permanent character, and could only be considered 'necessary' within the meaning of Article 8 para. 2 (art. 8-2) if supported by particularly strong reasons», whereas «the applicant's state of health had not been such that she would have been permanently unable to care for her daughter». The strictness of the Court's supervision in *Johansen* appears commensurate to the extreme nature of the interference. The permanent termination of parental status and of all contact against the wishes of the natural parent is arguably the most severe form of interference with a parent's rights under Article 8; it

<sup>60</sup> Article 3 reads: «The first priority for a child is to be cared for by his or her own parents». Similarly, the third paragraph of the Preamble to the Declaration reaffirms the need to protect the integrity of the biological family, a principle enshrined in the 1959 UN Declaration on the rights of the child: «Reaffirming principle 6 of [the] Declaration [of the Rights of the Child], which states that the child shall, wherever possible, grow up in the care and under the responsibility of his parents and, in any case, in an atmosphere of affection and of moral and material security».

<sup>61</sup> Article 4 reads: «When care by the child's own parents is unavailable or inappropriate, care by relatives of the child's parents, by another substitute - foster or adoptive - family or, if necessary, by an appropriate institution should be considered».

<sup>62</sup> *Johansen v Norway*, Application no. 17833/90, Eur Court H.R. judgment of 7 August 1996, para. 52.

<sup>63</sup> *Ibid.*, para. 56.

<sup>64</sup> *Ibid.*, para. 74. The Court added that «[t]he argument that the applicant might disturb the calm and stable foster-home environment could not be decisive as access arrangements could have been implemented outside the foster home. Having regard to the improvements in the applicant's situation and the irreversible effects which the deprivation of the applicant's parental rights and access had on her enjoyment of family life with her daughter, the measures could not be said to be justified».

can only be justified where it is obvious that the child cannot be reunited with the parents in the foreseeable future, and that there are no less intrusive means to secure the welfare of the child.

The ramifications of the constraints placed on States by parents' rights in adoption cases were recently evidenced in *X v Croatia*.<sup>65</sup> In this case the mother, who suffered from paranoid schizophrenia, was divested of the capacity to act, on the ground that her illness affected her capacity to take care of her own rights and interests. The consequence in domestic law was that she was also divested of parental rights, her consent for adoption not being required. The applicant's daughter had lived with the mother for the first two years of her life, though she was effectively cared for by the maternal grandmother; she was subsequently taken into State care, but maintained contact with the mother. The exclusion of the applicant from the proceedings leading to the adoption order was based on the automatic effect of her being divested of the capacity to act, and she had been given no opportunity to express her views about the potential adoption. Under the circumstances, the Court considered that a bond had been formed between mother and child amounting to family life within the meaning of Article 8 ECHR. The adoption order, severing all ties between the applicant and her child, amounted to a very serious interference with her family life, and this interference was incompatible with the Convention insofar as the authorities had never assessed the relationship between the applicant and her child prior to the adoption proceedings, nor had there been a separate decision on the applicant's parental rights.<sup>66</sup>

Violations of Article 8 have equally been found where the natural father's rights in adoption proceedings were not properly observed. The Court accepted, as a matter of principle, that a different treatment between mothers and unmarried fathers is lawful under the Convention in the light of the variable relationship between a child and a natural father, going from commitment to indifference.<sup>67</sup> However, the obligation to allow a natural parent to be sufficiently involved in adoption proceedings generally extends to unmarried fathers, as shown by *Keegan v Ireland*. The case concerned the adoption of a child without the knowledge or consent of the natural father. Following the breakdown of their relationship, the mother had decided to offer the child for adoption immediately after the birth, and was able to do so as domestic legislation did not recognize any right to the biological father, unless he had been designated as the child's legal guardian. The European Court relied on the principle established in the *Marckx* judgment, according to which a child forms a family unit with the parent since the moment of birth and by the very fact of it, regardless of the nature of the legal ties

<sup>65</sup> *X v Croatia*, Application no. 11223/04, Eur Court H.R. judgment of 17 July 2008.

<sup>66</sup> *Ibid.*, paras. 44-55.

<sup>67</sup> See *MB v United Kingdom*, Application no. 22920/93, Eur Comm H.R. decision of 6 April 1994, para. 3: «The relationship between a natural father and a child may differ widely in nature and degree from, for example, circumstances where a child is conceived casually, unintentionally or perhaps even violently to the situation where a child is born into a stable and established relationship between an unmarried man and woman».

between them.<sup>68</sup> Several factors supported the finding on the facts of the case: the couple had cohabited for a significant period of time, they had knowingly decided to conceive a child during the preparation of their wedding, and the father had constantly manifested interest in the child during the pregnancy and after the birth.

The stable relationship between the natural father and the mother, as well as the former's commitment towards the child, lead to a presumption of "family life" that cannot be interfered with without consulting the natural father, even where the relationship between the parents has broken down before the child's birth. Nonetheless, it is unclear whether the same obligations exist *vis-à-vis* natural fathers where the child is the result of a fleeting relationship. Arguably, the Court in *Keegan* would not have had to rely on additional arguments to prove pre-existing family life and the father's commitment if the mere biological relationship had resulted in the same right to be consulted in relation to the adoption.

The recent case law has also limited States' autonomy in regulating adoption as far as the legal effects of an adoption order are concerned. As is known, adoption normally severs all legal ties with the birth family and creates a new legal relationship with the adoptive family. This may result in undesired consequences in the case of in-family adoptions whereby a step-parent wishes to form a legal bond with the step-child, but his or her spouse, the natural parent, also wishes to preserve theirs.<sup>69</sup> In *Emonet v Switzerland*, national provisions whereby the adoption of a disabled adult by the mother's cohabitee had the effect of severing the legal ties with the mother was considered to constitute a violation of Article 8: «The Court found that "respect" for the applicants' family life required that biological and social reality be taken into account to avoid the blind, mechanical application of the provisions of the law to this very particular situation for which they were clearly not intended. Failure to take such considerations into account flew in the face of the wishes of the persons concerned, without actually benefiting anybody».<sup>70</sup> Unlike other rulings concerned with the application of domestic

<sup>68</sup> See *Keegan v Ireland*, Application no. 16969/90, Eur Court H.R. judgment of 26 May 1994, para. 44: «The Court recalls that the notion of the "family" in this provision is not confined solely to marriage-based relationships and may encompass other *de facto* «family» ties where the parties are living together outside of marriage [...] A child born out of such a relationship is ipso iure part of that «family» unit from the moment of his birth and by the very fact of it. There thus exists between the child and his parents a bond amounting to family life even if at the time of his or her birth the parents are no longer co-habiting or if their relationship has then ended». See also *Gül v Switzerland*, Application no. 23218/94, Eur Court H.R. judgment of 19 February 1996, para. 5 (family life existed between the father and his seven-year-old legitimate son, even though he had not seen him for almost seven years).

<sup>69</sup> The reform of adoption law in England and Wales illustrates the difficulties in reconciling the effects of adoption with the specific circumstances of step-parent adoption: before the Adoption and Children Act 2002, the natural parent had to adopt his or her own child in a joint application with the new spouse; after December 30, 2005, pursuant to entry into force of the above-mentioned statute, the step-parent can seek adoption as a sole applicant (s 51 (2)), and the adoption order does not affect the parental status of the former's partner, while it does extinguish the parental status of the other natural parent.

<sup>70</sup> *Emonet v Switzerland*, Application no. 39051/03, Eur Court H.R. judgment of 13 December 2007, para. 86.

adoption law by different State authorities in a particular case, this judgment directly called for legislative reform in the area of adoption, showing the far-reaching effects of Strasbourg supervision.

However, the rights of natural parents in connection with adoption are not unlimited, because they need to be balanced against the rights of the children. Moreover, the Strasbourg Court suggested in the 2008 *Kearns v France* judgment that, in a case in which the competing interests of the biological mother, the child and the adoptive family are at stake, «[i]n striking a balance between these different interests, the child's best interests should be paramount».<sup>71</sup> In particular, the judgment established that a time limit of two months prescribed by national law for a parent to withdraw consent to adoption did not infringe the parent's right to respect for family life. The rationale lay in the interest of the child to create new bonds with the adoptive family as soon as practically possible.<sup>72</sup>

#### 4. Dispensing with parental consent to further the best interests of the child

Under exceptional circumstances, where the child's bonds with the biological father are significantly weaker than the bonds established with the step-parent, the Court does not consider the adoption order in favour of the latter a violation of the former's Article 8 rights. According to the Court's reasoning in *Söderbäck v Sweden*, the natural family ties must give priority to the *de facto* family ties formed between the step-father, the mother and the child in the course of several years.<sup>73</sup> Similarly, in *Kuijper v Netherlands* – which, interestingly, concerned an adoption severing the legal ties with the mother – the Court had regard to the fact that the request for adoption merely sought to consolidate existing ties, and that it was fully supported by the child, who had almost come of age.<sup>74</sup>

The more recent case of *Eski v Austria* confirms that domestic courts' decision to grant permission for a child to be adopted without the consent of the natural parent does not necessarily breach Article 8 if the decision serves the best interests of the child concerned and reflects an already existing social reality. The child's parents had separated when she was two years old, and there had been very little contact between the child and the natural father, he had not made maintenance payments, and during the

<sup>71</sup> *Kearns v France*, Application no. 35991/04, Eur Court H.R. judgment of 10 January 2008, para. 79.

<sup>72</sup> *Ibid.*, para. 80.

<sup>73</sup> See *Söderbäck v Sweden*, Application no. 24484/94, Eur Court H.R. judgment of 28 October 1998, para. 33: «the child had been living with her mother since her birth and with her adoptive father since she was eight months old [...]. He had taken part in the care of M., who regarded him as her father [...]. Thus, when the adoption was granted [...], *de facto* family ties had existed between the mother and the adoptive father for five and a half years, until they married in January 1989, and between him and M. for six and a half years. The adoption consolidated and formalised those ties [...]. In taking the measure the District Court had regard not only to the investigation carried out by the Social Council but also to the evidence given by the applicant and the adoptive father: at a hearing [...] and was thus in a better position than the European judges in striking a fair balance between the competing interests involved».

<sup>74</sup> *Kuijper v Netherlands*, Application no. 64848/01, Eur Court H.R. decision of 3 March 2005.

visits his aggressiveness towards the mother caused the child to suffer stress and anxiety. The Strasbourg Court considered that the adoption decision had constituted an interference with Mr Eski's right to family life, but that the domestic courts had struck a fair balance between the competing interests involved. In particular, the following elements indicated that the decision had not been disproportionate: the absence of close ties between father and child, the father's lack of commitment demonstrated by the unwillingness to provide financial support, the detrimental effect on the child of the father's attitude towards the mother, and the child's views to the effect that she considered the mother's husband as her father and favoured the adoption, which thus merely consolidated *de facto* ties.<sup>75</sup>

However, it should be stressed that the reprehensible conduct of the natural parent, as seen in *Eski*, is not the decisive argument. The judgment in *Chepelev v Russia* disclosed a similar concern for allowing the consolidation of the new social family created between child and step-father when the natural parent's presence in the life of the child is simply marginal. In *Chepelev* the new husband of the applicant's ex-wife had successfully brought proceedings to adopt the applicant's daughter, as the domestic courts considered the adoption to be in the best interests of the child. The Strasbourg Court supported the domestic courts' assessment, insofar as the applicant had not seen his daughter since she was two years old (more than three years before the adoption order was granted) and she considered the mother's husband to be her father.<sup>76</sup>

This consistent pattern of jurisprudence shows that, under the balance of interests doctrine, natural parents who fail to prove commitment (infrequent contact, no financial support, etc.) seem to forfeit their right to parental status, for the benefit of the child's legal integration into an already existing *de facto* family.

##### 5. The (almost) equal standing of biological and adoptive families under Article 8

Starting from the early case law of the Strasbourg organs, it became apparent that adoptive parents and children are entitled to the same protection under Article 8 as any other form of family. In the 1975 *X v Belgium and Netherlands* decision, while refusing to accept the existence of a right to adopt under the ECHR, the Commission highlighted that, where adoption has taken place according to the relevant national law, a relationship emerges between adopter and adoptee that undoubtedly comes under the scope of Article 8, and separating such persons would amount to a denial of their right to respect for family life, in contrast with the State's conventional obligations.<sup>77</sup>

<sup>75</sup> *Eski v Austria*, Application no. 21949/03, Eur Court H.R. judgment of 25 January 2007, paras. 38-43.

<sup>76</sup> *Chepelev v Russia*, Application no. 58077/00, Eur Court H.R. judgment of 26 July 2007, paras. 27-28.

<sup>77</sup> See *X v Belgium and Netherlands*, *cit.*, at 77: «The fact that the applicant cannot claim "the right to found a family", does not mean, however, that the relationship between an adoptive parent and an adoptive child is not of the same nature as the family relations protected by Article 8 of the Convention. The

In the 1977 *X and Y v United Kingdom* decision, the Commission considered, in a rather reserved formulation, that adoption may be one way to found a family within the meaning of Article 12: «[T]he Commission considers that the adoption of a child and its integration into a family with a couple might, at least in some circumstances, be said to constitute the foundation of a family by that couple. It is quite conceivable that a "family" might be "founded" in such a way». <sup>78</sup> Similarly, the concept that a family may well be founded by means of adopting children was alluded to in an *obiter dictum* in the *Van Oosterwijck v Belgium* case.<sup>79</sup>

The principle was more forcefully reiterated in the 1981 *X v Netherlands* case, where the Commission affirmed that founding a family under Article 12 does not exclusively refer to biological descent: «[T]he concept of family life in a great number of member States legitimates the view that the founding of a family, within the meaning of Article 12, does not only envisage natural children, but also adoptive children. As provided by the Article, the exercise of such a right is governed by the national laws». <sup>80</sup>

As discussed before, nothing in these decisions suggests an obligation under Article 12 to provide for adoption, and where the legal option exists it is governed by domestic laws. However, once the family has been founded in accordance with domestic provisions, adoptive families are assimilated to natural families for the purposes of the protection afforded by Article 8. In the 1982 *X v France* decision,<sup>81</sup> the Commission clearly stated that adoptive families are covered by Article 8. The applicant and his wife had adopted a 6-year-old boy in 1968 with the consent of the natural mother, but following the death of the applicant's wife and his remarriage a conflictual situation had developed with the child, with the result that the applicant entrusted the child provisionally in 1975 to his natural mother. Two years later, the mother refused to return the child, she requested guardianship and obtained a court decision withdrawing the applicant's parental authority, and awarding the child to her. The Commission observed, relying on *X v Belgium and Netherlands*, that «although the right to adopt is not one of the rights specifically guaranteed under the Convention, the relations between an adoptive parent and an adopted child are as a rule the same family relations protected by Article 8». <sup>82</sup> The Court found however that the domestic legislation did not discriminate between adoptive parents and biological parents in respect of the possibility of withdrawal of parental responsibility for lack of care; the proceedings leading to the judicial decision to withdraw parental authority applied, as between the adoptive father and the natural

Commission is of the opinion that a State cannot separate two persons united by an adoption contract, or forbid them to meet, without engaging its responsibility under Article 8 of the Convention».

<sup>78</sup> *X and Y v United Kingdom*, *cit.*, at 34.

<sup>79</sup> See *Van Oosterwijck v Belgium*, Application no. 7654/76, Eur Comm H.R. report of 1 March 1979, para. 59: «une famille peut toujours être fondée par l'adoption d'enfants».

<sup>80</sup> *X v Netherlands*, *cit.*, at 177.

<sup>81</sup> *X v France*, Application no. 9993/82, Eur Comm H.R. decision of 5 October 1982.

<sup>82</sup> *Ibid.*, p. 243.

mother, the same principles that would have applied in a custody case between two divorced parents, the emphasis being placed on the child's physical and emotional well-being. The complaint was rejected insofar as the withdrawal of parental responsibility sought to secure the "health" and "protection of the rights" of the child within the meaning of Article 8 (2).

The 2004 judgment of the Court in the *Pini and Bertani* case<sup>83</sup> confirms and consolidates the Commission's approach to adoptive families as covered by Article 8, even in an extreme case where the relationship between adopters and adoptees is merely a legal one. The applicants, two Italian couples, had obtained adoption orders in respect of two 9-year-old Romanian girls living in a private care centre. However, the care centre had refused to transfer custody to the applicants, who complained that the Romanian authorities had not taken the necessary steps to enforce the orders. Even though the children concerned had never lived with their adoptive families, the European Court found that there was a bond between the applicants and their adopted children that benefited from Article 8 guarantees: «although the right to adopt is not, as such, included among the rights guaranteed by the Convention, the relations between an adoptive parent and an adopted child are as a rule of the same nature as the family relations protected by Article 8 of the Convention».<sup>84</sup>

Thus, a relationship created by a lawful final adoption order, conferring parental status upon the applicants, even in the absence of any close *de facto* ties, was sufficient to trigger the protection of Article 8. A parallel can be drawn with previous case law establishing that the mere biological bond between parent and child gives rise to "family life" within the meaning of Article 8 before they had a chance to develop a family life together,<sup>85</sup> and that Article 8 may even extend to the potential relationship between a child born out of wedlock and the putative father seeking to challenge the presumption of paternity in favour of his former fiancée's husband.<sup>86</sup> Analogously, the mere legal bond between adoptive parent and adoptive child triggers the application of Article 8, which protects the *potential* relationship they may develop. This seems to indicate the recognition of the equal value of adoption-based descent with respect to natural descent.

Interestingly, however, the presence of parental ties based on adoption results in an alteration of the balancing exercise normally undertaken by the Court to decide cases in which the interests of parents and children are in contrast. The Court seems to suggest in *Pini and Bertani* that in adoption cases the interests of the children more easily prevail over the interests of the adoptive parents: «The Court considers that it is *even more important* that the child's interests should prevail over those of the parents in the case

<sup>83</sup> *Pini and Bertani & Manera and Atripaldi v Romania*, Applications nos. 78028/01 and 78030/01, Eur Court H.R. judgment of 22 June 2004.

<sup>84</sup> *Ibid.*, para. 140.

<sup>85</sup> *Keegan v Ireland*, *cit.*

<sup>86</sup> *Nyland v Finland*, Application no. 27110/95, Eur Court H.R. decision of 29 June 1999, para. 2.

of a relationship based on adoption».<sup>87</sup> The explanation lies in the fact that «adoption means "providing a child with a family, not a family with a child"».<sup>88</sup> Adoptive parents are, therefore, in a more precarious position when compared to biological parents, for the courts are entitled to treat the children's welfare as paramount rather than seek to achieve a fair balance between concurring rights.

Thus, in *Pini and Bertani* the applicants' aspirations to found a family were superseded by the competing interests of the children: «the applicants' right to develop ties with their adopted children was circumscribed by the children's interests, notwithstanding the applicants' legitimate aspirations to found a family».<sup>89</sup> Greater weight was placed on the children's wishes not to be removed to a foreign country and live with persons they perceived as strangers,<sup>90</sup> and on their unlikely harmonious integration into the new families.<sup>91</sup> The domestic authorities' decision not to further seek to enforce the adoption orders was consequently not found in breach of Article 8.<sup>92</sup> The decision does not appear unfair on the facts of the case, considering that at issue was the adoption of older children, and that the adoptive parents had never actually fulfilled a parental role. Nonetheless, the general principle allowing for a difference of treatment between an adoptive parent and a natural parent may appear less justified in cases concerning adoption of babies, and where the adoptive parent has cared for the child for a long period of time.

The principle of *Pini and Bertani* is in sharp contrast with the view taken in *Johansen v Norway* with regard to natural parents. In that context the Court rejected the respondent government's claim that, in case of contrast between parents' and children's interests, the latter are paramount, and insisted that «a fair balance has to be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child».<sup>93</sup> The Court continued by saying that [i]n carrying out this balancing exercise, the Court will attach particular importance to the best interests of the child, which, depending on their nature and seriousness, *may* override those of the parent", «in particular [...] the parent cannot be entitled under Article 8 [...] to have such measures taken as would harm the child's health and development».<sup>94</sup> This

<sup>87</sup> *Pini and Bertani & Manera and Atripaldi v Romania*, *cit.*, para. 156 (emphasis added).

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*, para. 165.

<sup>90</sup> See *ibid.*, para. 153: «at issue here are the competing interests of the applicants and of the adopted children. There are unquestionably no grounds, from the children's perspective, for creating emotional ties against their will between them and people to whom they are not biologically related and whom they view as strangers».

<sup>91</sup> See *ibid.*, para. 164: «Their conscious opposition to adoption would make their harmonious integration into their new adoptive family unlikely».

<sup>92</sup> *Ibid.*, para. 166.

<sup>93</sup> *Johansen v Norway*, *cit.*, para. 78.

<sup>94</sup> *Ibid.* (emphasis added). See, however, *Yousef v Netherlands*, Application no. 33711/96, Eur Court H.R. judgment of 5 November 2002, para. 73, for a decision where the child's welfare was considered "paramount" when competing with the natural parent's interests. Nonetheless, it should be pointed out that



seems to suggest that the children's interests are paramount in case of conflict with the interests of adoptive parents, while in case of conflict with the biological parents' rights anything falling short of physical or emotional (risk of) harm may not reach the threshold required. Against the background of the recognition of the adoptive family as "family" for all intents and purposes under Article 8, this is undoubtedly an important distinction in the level of protection afforded to adoptive parents as opposed to natural parents.

Another difference between biological families and adoptive families is that the latter are not necessarily irreversible. However, a decision revoking an adoption order is a very serious interference and needs to be justified by compelling reasons under the second paragraph of Article 8. In the 2010 *Kurochkin v Ukraine* judgment, the Court found that the annulment of a child's adoption was a disproportionate interference in the adoptive father's family life: the decision was not supported by sufficient reasons to demonstrate that it was necessary in a democratic society.<sup>95</sup>

The Strasbourg Court also had an opportunity to assess whether there can be any lawful difference of treatment between biological children and adoptive children. In *Pla and Puncernau v Andorra*, the Court considered whether discrimination of adopted children with regard to inheritance rights was compatible with the ECHR. Interestingly, the case did not concern statutory provisions on adoptive children's inheritance rights, but the interpretation of a testamentary disposition drafted in 1939 and executed in 1995. The testatrix intended to live her assets to her son as life tenant, with the remainder to a son or grandson of a lawful and canonical marriage. Submitting that, as an adopted child of the deceased's son, the applicant could not inherit under the will, two great-grandchildren of the testatrix brought civil proceedings; the court of appeal considered that adoption had been unheard of in Andorra during the first half of the twentieth century, and therefore the intention of the testatrix could not have been to include an adoptive child.<sup>96</sup>

The European Court found that there had been a violation of Article 14 read in conjunction with Article 8. There was nothing in the will to suggest that the testatrix intended to exclude adopted grandsons, and the interpretation of the notion of "son" as to cover only biological sons was in blatant disregard of the prohibition of discrimina-

tion. The contested measure (impossibility to legally recognize the child) did not prevent the applicant's access to the child.

<sup>95</sup> *Kurochkin v Ukraine*, Application no. 42276/08, Eur Court H.R. judgment of 20 May 2010, paras. 53-59. The applicant and his wife had adopted an 11-year old child. The child developed negative relations with the adoptive mother, towards whom he was aggressive, therefore she sought an annulment of the adoption order. Though the relations with the father were positive, and the couple were divorced by the time of the annulment proceedings, the annulment was ordered in respect of both parents. However the child continued to live with the applicant, who eventually was appointed his legal guardian. For the Court this evidenced that the measure was not necessary, insofar as it disavowed the finding that the applicant lacked authority over the child and was unable to ensure his proper upbringing.

<sup>96</sup> *Pla and Puncernau v Andorra*, Application no. 69498/01, Eur Court H.R. judgment of 13 July 2004, paras. 47-52.

tion.<sup>97</sup> The distinction operated in the judicial interpretation of the will was found to pursue no legitimate aim and to have no objective and reasonable justification; an adopted child was in the same legal position as a biological child of his or her parents in all respects.<sup>98</sup> The Court also stressed that, since the Convention is a dynamic instrument, the domestic courts could not ignore new realities: even though the will had been made in 1939, the testatrix could not be presumed to have meant that adoptive children were not considered "children" for succession purposes.<sup>99</sup>

#### 6. Recognition of foreign adoptions

The margin of appreciation recognized to States in connection with the regulation of domestic proceedings for adoption applies *a fortiori* to the treatment of foreign adoptions. As expressed by the Commission in the already mentioned *X and Y v United Kingdom* decision, States are under no obligation to admit international adoptions, to recognize legal effects to adoptions occurred in other States; or to permit the entrance of foreign minors into their territory with a view to adoption proceedings. The Commission considered consistent with UK's conventional obligations the decision not to recognize the adoption in India of an Indian child by the uncle, a British citizen of Indian origins, and consequently not to allow the child to enter the UK in order to live with the adoptive father. According to the Commission, as long as the State does not interfere with a person's right to procreate, the refusal to grant the individual a right to found a family according to a particular procedure sought by him or her does not breach Article 12 ECHR.<sup>100</sup>

Naturally, States have an obligation to recognize foreign adoptions when such recognition stems from other commitments under international law. The 1986 UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally prescribes the right of the adoptive family to adequate protection, especially in case of inter-country adoptions, for which recognition of the foreign adoption order is critical.<sup>101</sup> However, no enforceable right can be based on a non-binding instrument. Conversely, a proper legal obligation to recognize legal effects to foreign adoptions

<sup>97</sup> *Ibid.*, paras. 58-59.

<sup>98</sup> *Ibid.*, para. 61.

<sup>99</sup> *Ibid.*, para. 62.

<sup>100</sup> See *X and Y v United Kingdom*, cit., p. 35: «Whilst the first applicant may have been prevented from exercising his right to "found a family" in the particular way in which he desired, the Commission does not therefore consider that this was inconsistent with Article 12, since the relevant national laws did not allow for the exercise of the right in such a way. There is no question of the right of the first applicant and his wife to procreate children having been interfered with». Also, since, despite the adoption, the child had continued to live with the birth family, and between him and the uncle/ adoptive father there had never been effective family life, the Commission held that Article 8 was not applicable.

<sup>101</sup> Article 23 of the Declaration reads: «In intercountry adoption, as a rule, the legal validity of the adoption should be assured in each of the countries involved».

binds the States Parties to the 1993 Hague Convention on inter-country adoptions.<sup>102</sup> The chief aims of the Convention include the introduction of uniform standards in adoption proceedings in the Contracting parties,<sup>103</sup> and the mutual recognition of adoption orders to protect the new families thus created.<sup>104</sup> Article 5, concerned with the conditions for adoption, does not consider eligibility issues, but Article 24 provides for a safeguard clause, allowing States to refuse recognition based on public order considerations, and taking into account the best interests of the child. This seemingly suggests that States who do not recognize same-sex marriages or civil partnerships may lawfully deny legal effects in their jurisdiction to an adoption order granted to a same-sex couple. However, where the facts of a case fall outside the temporal or material scope of application of the Hague Convention,<sup>105</sup> one might inquire whether any guarantees stem from the human rights enshrined in the ECHR.

In *Wagner and J.M.W.L. v Luxembourg*, the European Court was called to assess the legitimacy under the ECHR of a State's refusal to recognize a lawful foreign adoption. The claimant, who had adopted a three-year old girl in Peru as a sole applicant, sought to have the Peruvian adoption decision declared enforceable in Luxembourg, with a view to secure, amongst other things, the acquisition of Luxembourg nationality by her daughter. Her application had been dismissed by the domestic courts, based on the fact that under domestic law unmarried persons were not eligible to adopt. Having found that there had been an interference with Mrs Wagner's and her daughter's right to respect for family life,<sup>106</sup> and that the interference pursued the legitimate aim of protecting "health or morals" and the "rights and freedoms" of the child,<sup>107</sup> the Strasbourg Court undertook to examine whether the measure was «necessary in a democratic society».

To that end, the Court observed that a broad consensus existed in Europe in favour of adoption by unmarried persons,<sup>108</sup> and that, moreover, the denial of full recognition to the adoption failed to take account of the actual social reality of the case; as a result of the authorities' refusal to fully recognize the adoption, the claimants encountered obstacles in their day-to-day lives (including the need to regularly apply for a resident permit and a visa to travel to certain countries).<sup>109</sup> The national decision therefore did

<sup>102</sup> The Convention, signed on 29 May 1993 and entered into force on 1 May 2005, has been ratified by 83 countries [last update: 18 January 2011].

<sup>103</sup> See fourth para. of the Preamble, Article 1 (a).

<sup>104</sup> See Articles 1 (c) and 23 (1).

<sup>105</sup> Naturally, even if a State breaches The Hague Convention, the victim cannot rely on that obligation before the European Court. See, eg., *Di Lazzaro v Italy*, cit., p. 139: «The Commission recalls that it is competent to apply only the European Convention on Human Rights and it is not competent to ensure the application of other international conventions as such».

<sup>106</sup> *Wagner and J.M.W.L. v Luxembourg*, Application no. 76240/01, judgment of 28 June 2007, paras. 113-123.

<sup>107</sup> *Ibid.*, paras. 125-126.

<sup>108</sup> *Ibid.*, para. 129.

<sup>109</sup> *Ibid.*, para. 132.

not promote the best interests of the child.<sup>110</sup> This also amounted, for the Court, to unlawful discrimination, insofar as the Peruvian girl had been penalised on account of her status as an adoptive child of an unmarried mother whose family ties were based on a foreign adoption order.<sup>111</sup>

Certainly, it may be argued that a person can circumvent national legislation on adoption by seeking an adoption order abroad under a more permissive legislation. However, the Court's argument concerning the importance of protecting the social reality is compelling. As long as there are no public policy reasons against recognition, no one's interests are served (and especially not the child's) by placing legal obstacles in the path of the development of a normal family life.

#### 7. Conclusions: the demise of the margin of appreciation doctrine?

The examination of the Strasbourg jurisprudence on adoption reveals that, while no right to adopt is recognized under the Convention (hence no obligation for States to include adoption in their legal systems), the regulation of this institution where States choose to introduce it is not free from European judicial supervision. The *Fretté* and *E.B.* rulings suggest that the lack of recognition by the Court of a right to adopt under Article 8 no longer has any practical effect, since the Court is willing to accept that adoption-related matters fall within the general ambit of Article 8. Even though States have no obligation to introduce legislation contemplating adoption, wherever they have done so (i.e. in the case of virtually all Contracting Parties), any claims involving adoption proceedings will be considered under Article 8, which is tantamount to admitting that the exercise of the right to adopt is protected under Article 8.

In the earlier case law, the Strasbourg organs were merely concerned with existing ECHR rights potentially interfered with in the course of adoption proceedings, such as the right to respect for family life of natural parents, whose claims under Article 8 raised no controversy. The protection of adoptive families lawfully created in accordance with domestic pre-requisites also appears as an unproblematic step taken by the European organs in their evolutive interpretation of the Convention. Another uncontroversial principle emerging from the case law is that adoption must be governed by the principle of paramountcy of the child's interests, insofar as, unlike other means of founding a family such as artificial insemination, adoption is not primarily about giving a child to a family, but about giving a family to a child.<sup>112</sup> Naturally, there is a risk of arbitrariness in resorting to concepts as vague and subjective as "best interests", and indeed «[t]he danger of such an approach is that the best interests principle becomes an essentially meaningless concept which can be invoked as a self-serving principle by

<sup>110</sup> *Ibid.*, para. 133.

<sup>111</sup> *Ibid.*, paras. 155-159.

<sup>112</sup> See P. MOROZZO DELLA ROCCA, *Riflessioni*, cit., p. 218: «l'adozione serve, inverso, a dare una famiglia al bambino [...] pur se il desiderio di genitorialità è comune alla base di un equilibrato approccio culturale all'adozione, che rifugge la motivazione puramente filantropica».

decision makers to garner legitimacy for their decisions». <sup>113</sup> That said, is the Strasbourg Court better placed or better equipped to assess where the interests of the child actually lie? And is there a unique answer to this question for all the national communities where the Convention applies, regardless of their social, cultural and legal traditions? Considering the recent jurisprudence, the European Court would apparently respond in the affirmative.

In performing their monitoring function, the Strasbourg organs have assumed the arduous task of seeking «une conciliation périlleuse entre les exigences du respect de l'intégrité de l'écrit conventionnel et les nécessités de l'interprétation évolutive». <sup>114</sup> Initially reserved *vis-à-vis* claims of parenthood not based on biological procreation, and profoundly aware of the ethical and social implications embedded in the policy choices at stake, <sup>115</sup> the Strasbourg organs preferred to allow a wide margin of appreciation to States. The more recent trends in adoption cases, however, indicate that the Court is willing to restrict that margin of appreciation even where there is no European consensus.

As a consequence of the activism of the Strasbourg organs, adoption has paradoxically moved from being a totally unregulated institution under the ECHR towards the judicial supra-national imposition of legislative choices in areas of family law where no common European values are yet crystallized. Thus, *E.B.* unmistakably indicates that domestic legislation cannot establish a bar on adoption for homosexual applicants, <sup>116</sup> which amounts to an important legislative decision not supported by a common ground at European level. Less clearly, but not implausibly, since a State cannot impose the rule that both a male and a female referent are necessary in the child's household, and insofar as adoption law cannot discriminate on the grounds of civil status more than on the grounds of sexual orientation, States may be bound to introduce adoption for unmarried people.

<sup>113</sup> J. TOBIN – R. MCNAIR, *Public international law and the regulation of private spaces: does the Convention on the Rights of the Child impose an obligation on states to allow gay and lesbian couples to adopt?*, in *Int. Jour. Law Pol. Fam.*, 2009, p. 114. Starting from examining the debate on the extension of eligibility for same sex couples to adopt underlying the approval of the Adoption and Children Act 2002 (conferring a right to adopt to same-sex couples even before the Civil Partnership Act 2004 was adopted!), the authors challenge the three main assumptions against the bill: the need for a male role model and female role model actively involved in his or her life; the risk of harm for children's development with respect to their cognitive and emotional development, gender identity, and sexual orientation; and the likelihood of experiencing social stigma and discrimination and reduced ability to develop effective social relationships. See *ibid.*, p. 119.

<sup>114</sup> M. LEVINET, *Filiation et vie familiale*, cit., p. 129.

<sup>115</sup> V. COUSSIRAT-COUSTÈRE, *Famille et Convention européenne des Droits de l'Homme*, in P. MAHONEY ET AL. (eds.), *Protection des droits de l'homme: la perspective européenne. Mélanges à la mémoire de Rolf Ryssdell*, Köln etc., 2000, pp. 303-304: «pas réservés par principe à l'égard des nouvelles parentalités mais dans l'attente d'une suffisante convergence des conceptions nationales».

<sup>116</sup> See A. BAINHAM, *Homosexual adoption*, in *Camb. Law Jour.*, 2008, p. 479-480: «It is crystal clear from this judgment that it is no longer lawful under the Convention for states to operate a blanket rule that they will not permit adoption by homosexuals. While sexual orientation can be relevant, along with all other circumstances, it cannot be a bar to eligibility».

The stance of the Court may be humanely justified, but it remains legally flawed. On the one hand, it is not consistent with the application of the margin of appreciation doctrine, which builds European standards on the common denominators, and allows wide discretion to national authorities in matters characterized by a lack of European consensus. <sup>117</sup> The *E.B.* ruling appears in striking contrast with the recent application of this doctrine in the *A, B and C v Ireland* 2010 decision, <sup>118</sup> where the Court (surprisingly) stated that, even though virtually all other European States permit abortion, a margin of appreciation should still be recognized to the Irish authorities in this particularly sensitive field. <sup>119</sup> There is a risk that the inconsistent use of the margin of appreciation doctrine could render European decision-making arbitrary and unpredictable.

Undoubtedly, certain aspects of adoption, in particular adoption by homosexuals, are still the subject of much disagreement in Europe, <sup>120</sup> and do not justify impositions under the umbrella of the European Convention. On the one hand, State authorities remain closer to their community, hence in a better position to assess its social perceptions and moral values at any given point in time. On the other hand, since there are no conclusive empirical studies on the welfare of children brought up by same-sex parents, the European Court should be guided by the precautionary principle, and opt for a less pro-active approach.

It is submitted that, absent a common European denominator, important legislative choices, significantly involving the sensitivities of national communities, should not be made in the European Court, but in national Parliaments. Thus, the awareness of any minority values and legitimate interests needs to pass through the communities' social conscience and through the debates of national legislatures rather than being imposed

<sup>117</sup> See, for example, *Kearns v France*, cit., para. 74: «The Contracting States will usually enjoy a wide margin of appreciation if the public authorities are required to strike a balance between competing private and public interests or Convention rights. This applies all the more where there is no consensus within the member States of the Council of Europe as to the relative importance of the interest at stake or as to the best means of protecting it».

<sup>118</sup> *A, B and C v Ireland*, Application no. 25579/05, Eur Court H.R. judgment of 16 December 2010, paras. 231-237.

<sup>119</sup> The Court observed that a consensus existed among the majority of the members States of the Council of Europe allowing broader access to abortion than under Irish law, indeed Ireland was the only Council of Europe member State which allowed abortion only when the pregnancy posed a risk to the life of the expectant mother (abortion was available on request in some 30 European countries; it was available for health-related reasons in approximately 40 States), and only three States (Andorra, Malta and San Marino) had more restrictive access to abortion than Ireland, in which States abortion was prohibited regardless of the risk to a woman's life. However, the Court found that the undisputed consensus among the Council of Europe member States was not sufficient to narrow decisively the broad margin of appreciation the State enjoyed as regards the balancing of the conflicting interests of the foetus and the mother.

<sup>120</sup> See J. TOBIN – R. MCNAIR, *Public international law and the regulation of private spaces*, cit., p. 128: «The ability of same sex couples to adopt children remains limited to only a handful of states - the UK, Spain, France, South Africa, Israel, Guam, Andorra, the Netherlands, Denmark, Belgium, Iceland, and Sweden [...]. Moreover in some of these jurisdictions, the scope of a gay or lesbian person's capacity to adopt is limited to 'second parent' or 'step parent' adoption, that is, the adoption by one partner of the biological or adopted child of the other partner. [...] Thus the dominant position, in those states in which adoption is permitted, is that same sex couples should not be eligible to adopt children».

top-down from Strasbourg. The current approach is arguably at odds with the European Court's judicial role: as interpreter of ECHR rights, the Court should seek to reflect existing mentalities and not to be at the vanguard of new and perplexing paradigms.<sup>121</sup> The ECHR is not a catalogue of abstract and objectively "just" values outside a specific geopolitical context, but an international treaty to be interpreted according to the common practice of States, with an emphasis on the current status of harmonisation of moral and legal values across Europe.

<sup>121</sup> V. GOUSSIRAT-COUSTÈRE, *Famille*, cit., p. 307: «La jurisprudence européenne ne bouleverse pas les mentalités mais elle doit les suivre».

## LA JURIDICTION UNIVERSELLE DU POINT DE VUE ESPAGNOL

PABLO ANTONIO FERNANDEZ SANCHEZ\*

SOMMAIRE: 1. Introduction. – 2. Antécédents. – 3. Compétence des ordres juridiques internes. – 4. La pratique espagnole. – 5. Conclusions.

### 1. Introduction

Nous pouvons dire que l'Espagne a mis la juridiction universelle à la mode. Le vendredi 16 octobre 1998, à trois heures du soir, le Juge Baltasar Garzón Real, magistrat-Juge du Tribunal Central d'Instruction numéro 5 de l'Audience Nationale a rédigé un mandat international de recherche et d'arrêt, pour de génocide, terrorisme et torture, contre l'ex-chef d'État du Chili, Auguste Pinochet Ugarte, sachant qu'il se trouvait dans une clinique londonienne, en convalescence en raison d'une opération chirurgicale. Tous les télétypes du monde se sont actionnés et c'est ainsi qu'on a popularisé l'expression *juridiction universelle*.

M. Pinochet se trouvait à Loncres, en visite privée, sans aucune immunité et les agents de Scotland Yard, avec leurs interprètes, ont communiqué l'arrestation formulée par le juge britannique de leur juridiction, qui avait reçu la commission rogatoire du juge espagnol.

Cela a représenté un coup de masse et un casse-tête pour les politiciens et les diplomates, et une énorme source d'animation pour les défenseurs de la cause des droits de l'homme.

Ce n'est pas parce que la juridiction universelle n'était pas une institution juridique internationale suffisamment connue par les experts, sinon parce que c'était la première fois qu'une arrestation ayant de telles caractéristiques avait été activée, en se basant sur la compétence attribuée par une loi interne à un juge national sans aucune relation avec la majorité des délits, qui avaient été commis à l'étranger, par des étrangers, contre des étrangers.

Pour le Royaume-Uni, il ne s'agissait pas d'une demande de juridiction universelle sinon, techniquement, d'une réponse à une demande d'extradition par l'Espagne, dans le cadre d'un traité dont les deux États étaient parties.

Toutefois, la répercussion médiatique a déclenché toutes les alarmes juridiques. De fait, à partir de cette affaire, des études consciencieuses ont été entreprises sur cette

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